Filed 5/6/19 P. v. Licina CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VLADIMIR LICINA, Defendant and Appellant.	H044643 (Santa Clara County Super. Ct. No. C1482410)

Appellant Vladimir Licina collided with his ex-wife's parked car, in which his ex-wife and his younger daughter were sitting, at a low rate of speed. No one was injured in the collision, and neither vehicle sustained significant damage. After Licina waived his right to a jury trial, the trial court conducted a bench trial and found Licina guilty of two counts of misdemeanor simple assault (Pen. Code, § 240)[1] and two counts of misdemeanor simple battery (§§ 242, 243, subds. (a), (e)). The trial court placed Licina on three years' formal probation subject to various terms and conditions, including a search condition.

On appeal, Licina argues that the misdemeanor battery charges were barred by the statute of limitations, the trial court erred in failing to take an express waiver of his right

[1] Unspecified statutory references are to the Penal Code.

to a jury trial following amendment of the information, there was insufficient evidence to support his convictions, his convictions for simple assault must be stricken as they are lesser included offenses of simple battery, and the trial court erred in imposing the probation search condition.

For the reasons set out below, we conclude that there was insufficient evidence to sustain Licina's convictions for simple battery and his conviction for simple assault of his younger daughter. We therefore reverse the judgment, directing the trial court to strike the convictions for simple battery and one of the convictions for simple assault. We reject Licina's argument that the trial court erred in imposing a probation search condition, and we do not reach his remaining arguments, as they address his convictions for battery.

I. FACTS AND PROCEDURAL BACKGROUND

On January 15, 2015, the Santa Clara County District Attorney filed an information charging Licina with two felony counts of assault with a deadly weapon, specifically, his car. (§ 245, subd. (a)(1); counts 1 & 2.) At a pretrial hearing on January 17, 2017, Licina waived his right to a jury trial on the information. Following some discussion of the parties' motions in limine, the district attorney advised the court and defense counsel of his intention to file a first amended information adding two counts of misdemeanor battery (§§ 242, 243, subds. (a), (e)). Defense counsel asked the court if she could respond to the proposed amendment the following morning so that she could review and discuss it with Licina. The trial court agreed.

On January 18, 2017, the trial court asked defense counsel for her position regarding the proposed amendment. Defense counsel stated that Licina did not object to the amendment of the information. The trial court granted the district attorney leave to file an amended information adding two counts of simple battery (§§ 242, 243, subds. (a), (e); counts 3 & 4). Defense counsel waived formal arraignment on the amended information and entered a plea of not guilty but did not waive Licina's right to a

speedy trial. The trial court did not ask Licina whether he wished to waive his right to a jury trial on the amended information, and the case proceeded to a bench trial.

A. *Prosecution's Case*

Licina's ex-wife, M.M., testified that she and Licina divorced in 2006. They had two daughters together, S.L. (older daughter) and E.L. (younger daughter), who were 14 and 12 respectively at the time of the 2017 trial. Under the custody arrangement in place in April 2014, Licina was entitled to custody of his children on Thursday afternoons and two Sundays each month.

On the afternoon of Thursday, April 24, 2014, M.M. drove both children to older daughter's soccer practice. M.M. drove the girls to the practice on that particular Thursday because she knew that Licina had a court date that morning, and she did not know if he would be able to pick up the girls. M.M. and the children arrived at practice around 3:00 p.m. While older daughter went to practice on the field, M.M. and younger daughter waited in the car. M.M. parked her car next to the sidewalk bordering the field, in the shade of a tree.

After waiting for anywhere from 20 to 45 minutes, M.M. noticed Licina's car turning onto the road in front of her. He was traveling on the right side of the road after making the turn. M.M. turned to look at younger daughter, who was sitting in the back seat. When she turned back to face the road, M.M. saw Licina was now on her side of the road (the wrong side of the road given his direction of travel), driving straight towards her. M.M. could see that Licina was facing toward her, though she could not recall if she made eye contact with him. M.M. looked back and forth between Licina's car and younger daughter in the rear seat as he continued to drive towards her. M.M. never saw Licina turn his head to look at the soccer field as he drove.

Licina drove into M.M.'s car, and M.M. felt "a big jolt." She felt her car move backward but was not certain how far it might have moved. M.M. was not wearing her seat belt and her head did not "snap or anything" when Licina hit her car. There was no

testimony that her body came into contact with any part of the vehicle's interior as a result of the collision. M.M. estimated Licina was "going around 25 miles an hour" before he collided with her car. The soccer coach witnessed the incident and he testified that, before the impact, he saw Licina's car driving "faster" than was usual for cars in that neighborhood. The coach observed that M.M.'s car was "jolted and then [it] returned back," rather than being "moved from its spot."

M.M. testified that the impact dented her front license plate and cracked the license plate frame, but the airbags did not deploy. M.M. was not worried that either she or younger daughter was injured in the collision. She called the police because of the "faster speed" and because Licina "got out of the car," which made her "feel threatened."

Younger daughter did not testify.

M.M. testified that, in 2006, Licina forced her car off the road as they were driving, though he did not collide with her. She also stated that on one or two other occasions during a custody exchange, Licina drove into M.M.'s parked car at a low speed—perhaps five miles per hour.

B. *Defense Case*

Licina testified he had to appear in court on the morning of April 24, 2014,[2] but he did not anticipate that the hearing would interfere with picking up his daughters that afternoon. Licina was home around lunchtime, and some time before 3:00 p.m. he drove to the parking lot where he and M.M. always met for the custody exchange. M.M. did not show up and, after perhaps 30 minutes of waiting, Licina drove home. Licina sent text messages to both daughters and M.M. but did not hear back from any of them.

[2] The record does not disclose why Licina was in court that morning, although he testified that he did not "feel angry towards [his] family members because of court that morning." The district attorney initially sought to have the trial court take judicial notice of "the complaint as well as the plea agreement on April 24th of 2014" but ultimately asked only that the court take judicial notice of the fact that Licina had a court appearance on that date.

Licina got back in his car and drove to the field where he knew older daughter had soccer practice. As he slowly drove up the street by the field, Licina looked over to the field to try and locate older daughter. Licina also drove into the oncoming traffic lane in order to improve his view of the field. Because M.M. was parked in the shade, Licina said he did not even see that there was a car in his path until he "touched" it with his car and stopped. At that point, Licina realized he had bumped into M.M.'s car, and he could see both M.M. and younger daughter sitting inside. Licina denied purposefully driving into M.M.'s car.

When the police arrived, Licina gave them a statement. Licina did not recall telling police that he had seen M.M.'s car immediately after he turned onto the street by the soccer field.

Licina said that M.M.'s testimony about him running into her car on prior occasions was "partially true." Those incidents took place while they were still married, and "those situation happened most like a joke when [he was] washing the car in front of the garage and . . . that kind of things happened." (*Sic*.)

Several witnesses testified that Licina was a person of good character, whom they considered honest and not prone to violence.

Rajeev Kelkar, Ph.D., testified as an expert in the fields of accident reconstruction and biomechanics. In preparing for his testimony, Dr. Kelkar reviewed the police report, photographs, and the transcript from the preliminary examination. Dr. Kelkar opined that the collision in this case involved "extremely, extremely low-speed contact," less than four miles per hour and likely as little as one mile per hour. If the collision occurred at 20 to 25 miles per hour as described by M.M. and the soccer coach, Dr. Kelkar testified that M.M.'s car would have been propelled backward anywhere from six to ten feet and sustained five to six inches of "crush" damage. Dr. Kelkar further stated that, with such a low-speed collision, there was no risk of the vehicle's occupants sustaining any physical

injuries, let alone fatal physical injuries. However, Dr. Kelkar could not offer an opinion as to whether the collision was inadvertent or intentional.

C. *Rebuttal*

On rebuttal, the district attorney presented a stipulation which stated that, if called as a witness, San Jose Police Officer Matias Cervantes would testify that he took Licina's statement at the scene of the incident. In that statement, Licina told Officer Cervantes that he saw M.M.'s car as he drove along the road and Licina intended to park in front of her car. Licina began to look at the soccer field for older daughter and failed to stop before hitting M.M.'s car. Licina denied intentionally ramming into her car.

D. *Verdict and sentencing*

On counts 1 and 2, the trial court found Licina not guilty of felony assault with a deadly weapon but did find him guilty of the lesser included offense of misdemeanor simple assault (§ 240). The trial court also found Licina guilty of both counts of misdemeanor battery (counts 3 & 4).

The trial court suspended imposition of sentence and imposed three years' formal probation. The trial court imposed various other conditions of probation, including a 30-day county jail term as well as a search condition. Defense counsel unsuccessfully objected to the search condition at the sentencing hearing. Licina timely appealed.[3]

II. DISCUSSION

A. *Insufficiency of the Evidence*

Licina argues that there was not sufficient evidence to support his convictions for assault against M.M. or younger daughter because there was no evidence that Licina had the requisite knowledge his actions would probably and directly result in injury to

[3] Although Licina was convicted only of misdemeanor charges, we have jurisdiction over this appeal because the information filed against him included felony charges, making it a "felony case" for purpose of appellate jurisdiction. (See *People v. Scott* (2013) 221 Cal.App.4th 525, 529–532.)

another. He further argues, as to the battery convictions, that there was no evidence to support the necessary element of "touching" of either M.M. or younger daughter.

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318.) "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Powell* (2018) 5 Cal.5th 921, 944, internal quotation marks omitted.) A reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "[A]n appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

1. Battery

Licina argues his convictions for simple battery must be reversed as there was no evidence to support the necessary element of "touching." We agree.

"A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) " 'Any harmful or offensive touching constitutes an unlawful use of force or violence' under this statute. [Citation.] 'It has long been established that "the least touching" may constitute battery. In other words, force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave a mark.' " (*People v. Shockley* (2013) 58 Cal.4th 400, 404.) Although "a battery cannot be accomplished without a touching of the victim" (*People v. Marshall*

(1997) 15 Cal.4th 1, 38), battery can occur even when the contact is indirect, such as knocking an object out of a victim's hand. (*In re B.L.* (2015) 239 Cal.App.4th 1491, 1496–1497.) A defendant's act of deliberately colliding his vehicle with a vehicle occupied by the victim constitutes simple battery where there is evidence that the vehicle collision resulted in increased force on the body of the victim. (*People v. Dealba* (2015) 242 Cal.App.4th 1142, 1152 (*Dealba*).)[4]

The evidence presented at trial was insufficient to support Licina's convictions for simple battery. Licina drove his car, on the wrong side of the road and collided with M.M.'s car. Although Licina denied seeing M.M.'s car before contacting it, there was contrary evidence presented showing that he was aware it was parked in front of him. However, the trial court heard no evidence that either of the victims was touched as a consequence of the collision.

Indirect contact by deliberately driving one's vehicle into another's vehicle may be sufficient to support a conviction for battery. (*Dealba, supra,* 242 Cal.App.4th at p. 1152.) In *Dealba*, the court employed a "force/impact" analysis to determine whether an "indirect impact generated by a particular vehicular collision [was] sufficiently forceful to establish the 'touching' element of battery." (*Ibid.*) The defendant in *Dealba* deliberately drove alongside the victim's vehicle and repeatedly smashed into the side of her vehicle, causing the victim to "wrestle with the steering wheel to prevent [her vehicle] from veering" into other cars parked alongside the road. (*Id.* at p. 1153.) The court concluded that "[i]t was this increased force on [the victim]'s hands and arms, as

[4] Licina contends that *Dealba* was wrongly decided. " 'We, of course, are not bound by the decision of a sister Court of Appeal. [Citation.] But "[w]e respect stare decisis . . . which serves the important goals of stability in the law and predictability of decision. Thus, we ordinarily follow the decisions of other districts without good reason to disagree." ' " (*In re Hansen* (2014) 227 Cal.App.4th 906, 918.) Licina's arguments against the holding in *Dealba* do not present a "good reason" sufficient to overcome the principle of stare decisis.

she was compelled to tighten her grip on the steering wheel that constituted the 'touching' element of the battery." (*Ibid.*) It made no difference that the victim was already holding onto the steering wheel before any of the collisions, because "the force [of defendant's car driving into the victim's car] . . . 'touched' her hands and arms through the steering wheel." (*Ibid.*) In its emphasis on the victim's interaction with the steering wheel in support of its finding of touching, the court in *Dealba* implicitly rejected the notion that the touching of one car to another—without any specific testimony about the car touching the victim (or at least interacting with the victim) as a result of the collision—suffices to support a conviction for battery.

Here, the trial court heard no evidence that the force of the collision caused any "touching" of either M.M. or younger daughter. M.M. testified that when his car contacted hers "[i]t was a big jolt," but she denied that her head "snap[ped] or anything." M.M. was not wearing her seatbelt while she was parked, and she was not asked if any part of her body came into contact with any part of the vehicle's interior as a result of the collision. Younger daughter did not testify at all, so there was no evidence whatsoever of what sort of impact, if any, she experienced.

We conclude that M.M.'s testimony that she felt a "jolt" as a result of the collision does not provide substantial evidence of the touching element of battery under the principles articulated in *Dealba.* There was no evidence presented at trial which established, with respect to either M.M. or younger daughter, an "indirect impact generated by a particular vehicular collision" which was "sufficiently forceful to establish the 'touching' element of battery." (*Dealba, supra,* 242 Cal.App.4th at p. 1152.) Accordingly, both of Licina's convictions for simple battery (counts 3 & 4) must be reversed.[5]

[5] Because we conclude the battery convictions must be reversed, we do not reach Licina's other arguments relating to the battery charges, namely that they were barred by

2. Assault

Licina next contends that insufficient evidence supported his conviction for assault. We disagree, but only as to the assault charge relating to M.M. We agree there was not sufficient evidence to support Licina's conviction for simple assault of younger daughter.

"Assault" is statutorily defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) The phrase " 'violent injury' . . . is not synonymous with 'bodily harm,' but includes any wrongful act committed by means of physical force against the person of another, even although only the feelings of such person are injured by the act." (*People v. Bradbury* (1907) 151 Cal. 675, 676; see *People v. Chance* (2008) 44 Cal.4th 1164, 1168, fn. 2.) "Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm. [Citation.] The evidence must only demonstrate that the defendant willfully or purposefully attempted a 'violent injury' or 'the least touching.' " (*People v. Colantuono* (1994) 7 Cal.4th 206, 214 (*Colantuono*), superseded by statute as indicated in *People v. Conley* (2016) 63 Cal.4th 646, 660, fn. 4.) "No actual touching is necessary [for simple assault], but the defendant must do an act likely to result in a touching, however slight, of another in a harmful or offensive manner." (*People v. Wyatt* (2012) 55 Cal.4th 694, 702.)

"An assault is an incipient or inchoate battery; a battery is a consummated assault." (*People v. Williams* (2001) 26 Cal.4th 779, 786.) As described above, deliberately driving one's vehicle into another's vehicle is sufficient to support a conviction for battery if there is evidence that some part of the victim's car came into

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the statute of limitations, that the trial court erred in failing to take a renewed jury trial waiver following amendment of the information, and that his convictions on the lesser included offenses of simple assault must be stricken in light of his convictions for battery.

contact with the victim as a result of the defendant's action. (*Dealba, supra*, 242 Cal.App.4th at p. 1152.) There was substantial evidence supporting the trial court's conclusion that Licina deliberately drove his car into M.M.'s car, and it was reasonable for the trial court to infer from this finding that this act would likely result in the touching of M.M. by some part of the car (the seat belt, the headrest, or the steering wheel, for example) as a result of the collision. While, for the reasons explained above, we have concluded that the prosecution did not elicit any such evidence—and thus the convictions for battery must be reversed—this failure of proof does not defeat the conviction for simple assault on M.M.

Assault requires only that Licina decided to do an act that would likely result in a touching, not an act that in fact resulted in a touching. The evidence presented at trial was sufficient to establish Licina committed simple assault on M.M. M.M. testified that, in 2006, Licina's aggressive driving forced her car off the road, and on one or two other occasions during custody exchanges, Licina deliberately drove into her car at a low rate of speed. In his testimony, Licina did not deny colliding with M.M.'s car but instead indicated he did not see her car until the moment he "touched" it with his car. However, M.M. testified that Licina was looking right at her as he drove toward her, and Licina told police at the scene that he saw M.M.'s car as he was driving toward her. This evidence constitutes substantial proof of assault on M.M.

As to younger daughter, the trial court heard no evidence that Licina "willfully or purposefully attempted a 'violent injury' or 'the least touching,' " on daughter. (See *Colantuono, supra*, 7 Cal.4th at p. 214.) Younger daughter was sitting in the back seat of M.M.'s car, and there was no testimony to support the inference that Licina saw her before hitting M.M.'s car. Licina's car approached M.M.'s car from the opposite direction and did not pass M.M.'s car before hitting her. Licina testified that he did not see M.M's car until *after* he collided with it, and it was only at that point that he saw M.M. and younger daughter sitting inside. Younger daughter did not testify at all, so

unlike with M.M., we do not know if younger daughter perceived Licina looking at her as he drove toward her mother's car. Because there is no evidence that Licina intended any touching of younger daughter, we reverse Licina's conviction for assault, as charged in count 2.

B. *Probation Search Condition*

Although our reversal of Licina's convictions for counts 2, 3, and 4 requires that the trial court resentence Licina, we address his challenge to the probation condition for the benefit of the trial court should it elect to reimpose the condition. Licina contends that the trial court erred in imposing a probation search condition because the condition has no relationship to the facts of his conviction, involves conduct that is not criminal, and is not reasonably related to future criminality. We disagree and conclude that the trial court did not abuse its discretion in imposing the search condition.

"In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*People v. Lent* (1975) 15 Cal.3d 481, 486, superseded on another ground as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290–292.) The test set forth in *Lent* "is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*People v. Olguin* (2008) 45 Cal.4th 375, 379–380 (*Olguin*).)

As an appellate court, we typically review a trial court's decision to impose conditions of probation for abuse of discretion. (*Olguin*, *supra*, 45 Cal.4th at p. 379.)

"That is, a reviewing court will disturb the trial court's decision to impose a particular condition of probation only if, under all the circumstances, that choice is arbitrary and capricious and is wholly unreasonable." (*People v. Moran* (2016) 1 Cal.5th 398, 403.)

It is undisputed that Licina's probation search condition is not related to the crimes of which he was convicted nor is it related to conduct that is itself criminal. Accordingly, Licina's challenge to the search condition rests on his contention that it is not reasonably related to preventing his future criminality.

Licina's convictions stemmed from his conduct of willfully colliding with his ex-wife's car after she failed to show up at an agreed-upon location for a custody exchange. There was evidence that Licina had previously driven into M.M.'s car at low speeds during prior custody exchanges. The ongoing contentious relationship between M.M. and Licina—characterized by his assaultive behavior—gives rise to a reasonable conclusion that the search condition is aimed at preventing future assaultive conduct by Licina against M.M. or others. In particular, given that Licina was also ordered not to possess firearms or ammunition and "obey all laws," the search condition would allow his probation officer to ensure that he was complying with his conditions of probation.

Licina relies on *In re Martinez* (1978) 86 Cal.App.3d 577 (*Martinez*) in support of his assertion that the search condition was not reasonably related to his future criminality. In *Martinez*, petitioner Martinez pleaded guilty to battery upon a police officer. (*Id*. at p. 578.) The offense occurred when "two uniformed police officers were attempting to impound an illegally parked vehicle" and "[a] crowd of approximately 50 young males and females began to form, yelling obscenities and throwing beer cans and bottles." (*Id*. at p. 579.) Petitioner threw a beer bottle at a police vehicle, and the trial court imposed a probation condition requiring petitioner to "submit to warrantless searches of his person or property by law enforcement officers." (*Ibid*.)

The appellate court in *Martinez* concluded that the search condition was not related to the petitioner's crime because he had not concealed any weapon. (*Martinez*,

supra, 86 Cal.App.3d at p. 582.) As to future criminality, the appellate court, after observing that the crime was of "only misdemeanor gravity" and "nothing in the defendant's past history or in the circumstances of the offense indicate[d] a propensity on the part of the defendant to resort to the use of concealed weapons in the future" (*id.* at p. 583), concluded the search condition was unreasonable. (*Id*. at p. 584.)

While *Martinez* has not been explicitly overruled by the California Supreme Court, it has been substantially undermined. The Supreme Court made clear in *Olguin* that a search condition may be imposed to ensure compliance with another condition of probation and to facilitate effective probation supervision. (*Olguin*, *supra*, 45 Cal.4th at pp. 380–381.) In rejecting defendant Olguin's contention that the condition requiring him to notify his probation officer of any pets was unreasonable (*ibid.*), the court stated: "[P]robation conditions authorizing searches 'aid in deterring further offenses . . . and in monitoring compliance with the terms of probation. [Citations.] By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.' [Citation.] A condition of probation that enables a probation officer to supervise his or her charges effectively is, therefore, 'reasonably related to future criminality.' " (*Ibid.*) The court confirmed that "[p]roper [probationary] supervision includes the ability to make unscheduled visits and to conduct unannounced searches of the probationer's residence." (*Id.* at p. 381.) In imposing a search condition on Licina here, the trial court did not abuse its discretion in similarly concluding that it would facilitate probation's efforts to appropriately supervise Licina and thus promote his rehabilitation.

Under the circumstances of this case, the warrantless search condition is reasonably related to the prevention of future criminality because it deters Licina from violating the law, facilitates probationary supervision, and promotes Licina's compliance

with the weapons condition. The trial court did not abuse its discretion in imposing the search condition.

III. DISPOSITION

The judgment is reversed. On remand, the trial court shall strike Licina's convictions on counts 2, 3, and 4 and resentence Licina on count 1.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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BAMATTRE-MANOUKIAN, J.

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